

REMARKS

A Declaration under 37 C.F.R. § 1.132 was filed by Applicant on February 28, 2002, providing objective evidence to rebut the obvious rejections of claims 11-21 and 23-63.

In response, the Examiner stated in paragraph 13 of the Final Office Action that the "applicant's assertions, including that of '*commercial success*,' and that of '*satisfying a long-felt need over the existing 'usual methods*', i.e. the prior art'(in particular as applied to the rejection of claims 62, 63) have no bearing on obviousness." Applicant respectfully disagrees.

It is USPTO policy to follow the Supreme Court's decision in *Graham v. Deere*, 383 U.S. 1 (1966), in the consideration and determination of obviousness under 35 U.S.C. 103 (see, e.g., MPEP 2141). One of the four Graham factual inquiries requires the Examiner to evaluate evidence of secondary considerations (see, e.g., MPEP 2141). The Examiner must consider objective evidence whenever present in determining the issue of obviousness of claims for patentability under 35 U.S.C. §103 (see, e.g., MPEP 716.01(a)). Objective evidence or secondary consideration such as affidavits or declarations containing evidence of criticality or unexpected results, commercial success, long-felt needs, etc., must be considered in every case in which they are present (see, e.g., MPEP 716.01(a) & 2141). The Court of Appeals for the Federal Circuit has stated that "evidence rising out of the so-called 'secondary considerations' must always when present be considered en route to a determination of obviousness" (see, e.g., *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530 at 1538; MPEP 716.01(a) & 2141; and *Graham v. John Deere Co.*, 383 U.S. 1).


Furthermore, evidence traversing rejections must be considered by the Examiner whenever present, and all entered affidavits, declaration, and other evidence traversing rejections

are to be acknowledged and commented upon by the examiner in the next succeeding office action (see, e.g., MPEP 716.01). In addition, if the evidence is insufficient to overcome the obvious rejection, the Examiner must specifically explain why the evidence is insufficient (see, e.g., MPEP 716.01).

In the current case, Applicant's Declaration under 37 C.F.R. § 1.132 provides objective evidence of commercial success, long-felt need, etc., to rebut the obvious rejection of claims 11-21 and 23-63. It is respectfully submitted that the Examiner has summarily dismissed such Declaration as "having no bearing on obviousness," without properly considering and responding to the Declaration as is required. It is Applicant's position that the Declaration provides evidence that is sufficient to overcome obviousness, together with Applicant's previous arguments in support of patentability.

Therefore, Applicant respectfully requests that the finality of the Office Action dated May 21, 2002 be withdrawn and that the Examiner consider the claim rejection in view of such Declaration. Applicant respectfully requests that the claim rejections be withdrawn.

Respectfully submitted,

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